THE SCOPE OF STATE AND FEDERAL LEGISLATION CONCERNING THE USE OF WATERS

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One of the leading defects of the confederation of the American Colonies, after the accomplishment of independence, was the want of power in the congresses to regulate commerce, and this, as much as any single cause, "conduced to the establishment of the Constitution," as Mr. Justice Story says in his "Commentaries on the Constitution." The power "to regulate commerce," conferred on the Congress of the Federal Government by the eighth section of Article I of the Constitution embraces the exclusive control of navigation. (*Gibbons* v. *Ogden*, 9 Wheat. 1.) The organic source of federal authority in the control of waters is in this section; the limitation of its power is that farthermost bound which marks the beginning of things not well within operation of a regulation concerning commerce among the states or with a foreign nation or an Indian tribe.

All that absolute right to regulate commerce and navigation carried on within their waters, or to improve navigation on intraterritorial streams, as well as such power over non-navigable waters, as existed in the government of the mother country, passed to the several colonies upon the acknowledgment of their independence. Title to the water and to the subjacent soil belonged to these several states, subject to the local laws and usages governing riparian rights, and was not surrendered at the adoption of the Constitution. The Federal Government, for purposes of commerce, merely acquired a paramount right to control all waters, intra- or inter-state, capable of supporting navigation among these units of the Union. In theory, it has power to conserve the public usufruct in waters so far as navigation is concerned—its jurisdiction ceasing at this point. The mode of the exercise of this power is left to the Congress with no limitation beyond that suggested by the purpose of the grant—to regulate commerce. Congress has the right to improve navigation; it may do this by dredging or by the erection of

dams with locks, or by either; or, it may do all things necessary to induce or regulate suitable stream flow through storage or headwaters, and it is believed, through the conservation of those reservoirs established by nature, the forests. Any and all methods which have the primary purpose of aiding or facilitating transportation by water are within the scope of federal legislative power.

While this power of quasi-sovereignty over navigable waters was transferred from the crown to the colonies, and afterward delegated by the latter to the National Government, the common law definition of a navigable watercourse, for a very obvious reason, was not a part of the acquisition. In the mother country, the ebb and flow of the tide constituted the determining factor, while here it is always a question of fact whether a stream be navigable or otherwise. Such great natural waterways, extending their courses hundreds of miles from the sea, like the Mississippi or the Ohio, were unknown in England; and to such conditions, the common law doctrine was plainly inapplicable.

Over those streams or bodies of water incapable of use for the purposes of trade or commerce in any way, the United States has no jurisdiction except in a single respect later to be mentioned. Of course, in those parts where the territorial form of government still exists, the Federal Government is both sovereign and proprietor as to such waters. It has the *jus publicum* and the *jus privatum*. Upon the admission of territories to statehood, this dual right is relinquished to the state subject to such prior grants as the Federal Government has made and generally upon the condition that the waters shall remain highways free to the citizens of the United States. The new states acquire the same rights, sovereignty and jurisdiction as were reserved to the thirteen original states at the adoption of the Constitution. (*Pollard* v. *Hagan*, 3 How. 212.) Generally speaking, then, each state has absolute sovereignty over non-navigable waters within its boundaries, as well as title to and dominion over navigable streams qualified only by the prerogatives surrendered to the Federal Government—the paramount control of the waters for navigation purposes. To the latter, all else must yield.

Aside from the adaptability of waters to the transportation of commerce, streams are mainly valuable as a source of power production and domestic water supply, and, in the arid regions, for

irrigation purposes. The state, generally, has control of the use of water in these respects, so far as any *jus publicum* is concerned.

The eastern seaboard states inherited the common law rule of riparian rights. A grant of land bordering on a non-navigable watercourse carried ownership to the centre or thread of the stream, subject to the public easement. That is, the title to the river bed *ad filum aquae* is in the riparian proprietors, not in common, but in severalty. Each proprietor has an equal right to the *use* of the water which flows in the stream adjacent to his land, as it was wont to run, without diminution or alteration. He has no property in the water; only a mere usufruct as it passes. He may not detain it, or divert it to the prejudice of other proprietors, up stream or down, save in some cases where he has a prior right or title to some exclusive enjoyment. He may divert it or a part of it provided he returns it to its usual channel as it leaves his estate. But the maxim usually applicable is *"Aqua currit et debet currere ut currere solebat."*

Ownership of lands upon the borders of a navigable stream, at common law, involved another rule: the boundary of the grant was the high water mark. The rule, however, is not applied in all the states. In some states it is held that riparian proprietorship extends to low-water mark, while in many the rule is the same as to both navigable and non-navigable streams—ownership of the bed of the stream *ad filum aquae,* subject to the public easement in the waters. Where the riparian's line extends to high or low-water mark, title to the river bed is in the state. As to the water itself, the state, whose interest is that of a sovereign, holds the property in the stream as a trustee for the public, subject to the rights of the United States, if it be a navigable stream, and to the rights of the riparian proprietor. The rights of the latter, however, must yield to the exercise of the police power of the state when the public welfare and health are in jeopardy. Aside from navigation, then, the state and the owners of the land by which it passes are the only parties which have an interest in such waters. Disputes between riparians are settled in the state courts. Needful regulations concerning pollution, etc., are within the scope of the legislative powers of the state, as are also mill acts, the maintenance of ferries, the erection of bridges, etc. It is even competent for a state, in the absence of adverse action by the Federal Government, to improve

navigation in those streams which are clearly, in that respect, within the federal jurisdiction. Likewise, and under such conditions, prior to federal legislation on the subject, the state could authorize the construction of dams or bridges. Of course when either interfered with navigation, the United States could order the removal of obstructions; and this without compensation. Under existing acts of Congress, however, dams, and other structures which may menace navigation, may not be erected in a navigable stream, even if it be wholly intra-state, unless the location and plans thereof be approved by the Secretary of War and the Chief of Engineers of the Army. That is, while the state still may authorize such a construction, the authorization is ineffective until the location and plans are approved in the manner stated; and by the Act of June 21, 1906 *(34 Stat. 386)*, these officers, in approving the plans and location of a dam, the construction of which is authorized by Congress, possess the power to impose such conditions and stipulations as they may deem necessary to protect the present and future interests of the United States.

In some of the western states, the ancient riparian doctrine yields to the rule of prior appropriation for mining and irrigation. The requirements of mining invoked this rule, which is rather of a "first come, first served" nature. For mining purposes, it is necessary to divert water from the natural course of its flow some distance to the mineral *in situ*. The first appropriator has the better right, and so on. The protection of these rights gave rise to numerous regulations and customs, which have been recognized by the state courts. Similar conditions in the arid regions induced the abandonment of the riparian doctrine—although in some of the states there is a mixed application of the old and new rule.

The adjustment of all these rights is the subject of state control. The Federal Government is a bystander unless interference with navigation is threatened or unless, as it may be, it is a riparian proprietor or appropriator itself; in which latter event its interest is merely that of any private owner.

Conflicting water rights are fruitful sources of local litigation; flowage, diversion, nuisances, etc. Here, the state, through its courts, is the adjuster. Through its legislature, it may regulate just so far as regulation does not involve the abrogation of vested rights. The public interest is fundamental and the "private prop-

erty of riparian proprietors cannot be supposed to have deeper roots." (*Hudson Water Co.* v. *McCarter,* 209 U. S. 349.) Nevertheless, private ownership is often the stumbling block in the way of legislation that would promote the interests of the people as a whole, because the line where the state's police power, exercised without compensation, properly ends, and where its exercise of eminent domain, with compensation, must begin, is not always perspicuous. The circumstance of owning land bounded by a stream gives the owner an advantage—a right—in that which should be the property of all alike, and which in some states is declared to be the property of the state; as, for instance, in the Constitution of Wyoming:

> The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are [*sic*] hereby declared to be the property of the state.

The Constitutions of Colorado and North Dakota contain similar provisions, and the Constitutions of California and Washington declare the use of waters for irrigation, mining and manufacturing purposes to be a public use; but this is one of the very few subjects not covered by the Constitution of Oklahoma.

Yet even where declared to be "the property of the state," the appropriator of the water acquires a distinct title; not perhaps as a mere incident to the soil, as in the case of a riparian owner, but still a distinct usufructuary estate based upon the actual appropriation; a property right which may not be taken or damaged for public or private use without just compensation.

The same basic principle exists in the Australian Commonwealth of Victoria; but there it is carried out to its legitimate conclusion. No one may permanently divert water; a license is granted for a limited period. And no diversion is free. Every user pays for what he uses, the charges being apportioned to the amount diverted and the value of the diversion to the user. For the development of hydro-electric power, for instance, the annual charge is about five dollars per H. P. A large revenue is thus produced, relieving the general taxpayer. The justice of this plan is apparent; he who enjoys pays therefor, and he who has an equal right in the water but cannot use it, is indirectly the beneficiary of the rental paid by the user; for general taxation is reduced. Moreover, the user has an

economic reason for avoiding waste; he must pay for what he diverts. Every user is a conservator. During the last decade there has not been a single lawsuit over water rights in Victoria. Furthermore, the Commonwealth reserves the right at any time to apply the water to a paramount use whenever the necessity arises. Naturally there are no "vested rights" to figure largely in the matter of compensation. There is no such thing as a riparian right in this progressive British colony. On substantially all streams a frontage of from four to eight rods is reserved as public land. This solves the pollution problem and in other ways simplifies the conservation of the public's rights in the water.

As far as the rights of the American public in the free navigation of its streams are concerned, they are happily conserved because they are paramount and supersede any right in the private owner of the adjacent banks. But the country is now at the threshold of a wonderful development of its unused water power to be transmuted into electrical energy at the mill site, and thence transmitted hundreds of miles to a hundred uses: power, traction, lighting, heating, and the multifarious modes of employing this convenient form of energy. With this possibility of conversion and conduction, there is, at strategic points throughout the country, potential water power sufficient to replace every other form of power now in use in manufactures, transportation, and domestic economics. Of this, but a small fraction is now utilized—about 5,300,000 H. P. Some 1,400,000 H. P. runs to waste over government dams. Far-sighted captains of industry, realizing what the next generation will bring forth—reduction in the fuel supply with its complement, an enhancement of cost—and anticipating the advancement that will come in the art of utilizing hydro-electric power, have already seized advantageous points, and even now a small group of "interests" controls a third of the present water-power production; that is, produces power the equivalent of that proportionate part.

With this portentous concentration of power production, the states, in part, must contend. In those states where, in the substantive law the waters are the property of the "state" or the "people," the problem may be more easily solved than in those older commonwealths where the mill sites are in individual ownership—if the interests of the public are to be conserved. This, and pre-

ceding generations, have realized the significance of monopoly in those things which are vital factors in the lives of all consumers, whether it be heat, light, food products, or transportation. Yet all these united must be multiplied to be tantamount in power to the monopolistic Colossus which is yet but a suckling, nurturing itself at the breast of its foster-parent, the public. For heat, light and transportation, and the power that turns the spindles and grinds the corn, will be the product of transmuted water power within the lifetime of our children.

While the state should promote the development of its resources and encourage enterprise in the individual, the superior right of all the citizens should be guarded by such stipulations and conditions in every grant of franchise as will prevent consolidation of control in a few and anything like perpetuity in enjoyment of this privilege. The life of a franchise should be limited in all cases, to a fixed term of years, say forty or fifty years, irrevocable save for breach of conditions, unless the state must take the water for a higher use in which event compensation must be paid. As the grant of a franchise proceeds from the many to a few who thus acquire special interests in the common property, the many should be recompensed by the payment of annual charges and by a limitation upon the price at which power may be sold.

While these things fall mainly within the scope of the state's power to legislate, the field of federal authority is much greater than its mere interest in navigation would suggest. Aside from the fact that in improving navigation on certain water courses, it develops incidentally a vast water power, it also has control of the location and construction of all dams across navigable streams, whether interstate or intrastate. Nor is this all; as the owner of lands bordering on a stream, it has all the rights of a riparian proprietor in those states where such rights are recognized; and, in its duty to conserve navigability of waterways, its jurisdiction is not necessarily limited to the navigable portions thereof, but may extend to the headwaters and those tributaries which supply or augment its flow. That is, if the diversion or appropriation to any inferior private or even public use of the waters of a tributary impairs or menaces the navigation of the main stream, Congress has power to check or regulate or prevent such use. No state may so legislate as to the appropriation of waters within its boundaries,

even of non-navigable tributaries which unite into a navigable water course, so as to destroy or interfere with the navigability of that water course in derogation of the interests of all the people of the United States. This was settled by the Supreme Court in *United States* v. *Rio Grande Dam & Irrigation Co.* (174 U. S. 690).

A notable instance of the exercise of the federal power is found in the creation of the California Debris Commission (*27 Stat. 507*), in 1893. The navigation of two rivers, each within the State of California, the Sacramento and the San Joaquin, was threatened, in part, practically destroyed by hydraulic mining operations carried on in the territory drained by their tributaries. Congress declared such mining to be unlawful, unless the persons desirous of engaging therein obtained a permit from the Debris Commission, and assented to be bound by federal law and regulation. The Commission had full power to prescribe rules, to locate debris reservoirs, impounding dams, storage sites in the tributaries, either for debris or for water, and to do all things needful to restore and maintain the navigability of said rivers, to deepen their channels, and even to protect their banks. These operations mainly affected the feeding streams, but the power of Congress nevertheless existed and was upheld by the Circuit Court of Appeals in *North Bloomfield Gravel Mining Co.* v. *United States* (99 Fed. Rep. 664). These were operations not necessarily in a stream, but by a stream, whereby silt and other debris were carried by the tributaries into the navigable rivers and therein deposited. The act not only affected those who contemplated the establishment of such mining, but also the owners of then existing impounding works. The court said:

"Congress has the power and authority to control commerce and navigation on the navigable portion of the Sacramento and San Joaquin Rivers *and their tributaries,* and to prevent any obstruction on such streams, or the performance of any act, by any person or persons which would tend in any manner to interfere with interstate or foreign commerce."

While the Federal Government is not authorized by the Constitution to create a water power for commercial purposes, although it undoubtedly has a right to do so for its own purposes, it is inevitable that in improving inland streams by a series of dams and locks that water power will thus be created. Indeed, nearly 1,400,000 H. P. is now running to waste over government dams,

constructed with no other view than that of aiding navigation. The government may not own the water, but it certainly owns the *power* it thus creates. Water power is not water; it is energy produced by the combination of running water and a suitable fall. Conceding that the *corpus,* the water itself even in a navigable stream, is the property of the state through which it passes, and that the Federal Government has no title to it, still it does enjoy the use and supreme control of it under its power to regulate commerce. In the use of it for a constitutional purpose, it may bring into existence that which was not there before—a form of energy. It owns what it produces and it may sell or lease the right to utilize its creature; and it would certainly be anomalous if it could not exact a consideration and impose a condition in making a sale or a lease. A sale is out of the question, for that would involve an investiture of rights which might later embarrass the government in the discharge of its duty respecting navigation. But the disposition and utilization of this power by the grant of a leasehold interest is not only a lawful, but a business-like exercise of federal power. Leases imply a termination of the lessee's interest at a definite time as well as a charge regularly to be paid. Just as I may impose conditions on my lessee restricting his use of my property or confining it in legitimate channels, so may the government restrict its grant in a manner to avoid monopoly. The charge it may impose may be devoted to general governmental purposes to the relief of taxation or be expended in the further development of navigation.

So, again, where the government by storage reservoirs, artificial or natural, expends money to conserve the flow of streams, it creates a condition of value in the production of power. By a natural storage reservoir about the headwaters of a stream, I mean a forest. Where the government has reserved a great forest for national purposes, expending money in its protection and the reforestation of its desolated areas, it is contributing as effectually to the perpetuity and uninterrupted development of power in a water course whose sources are protected by these national forests, as it would by the providence of artificial storage. The rivulets and creeks which spring from these forests unite to make in whole or part the navigable watercourse. A corporation is granted the right by the state legislature or by Congress to erect a dam on such a stream for the purpose of developing hydro-electric power. Under the

federal law, it may not proceed until the Secretary of War and the Chief of Engineers approve not only the location, but the plans. Under the Act of June 21, 1906, already noticed, these federal officers are authorized to impose such conditions and stipulations as they may deem "necessary to protect the present and future interests of the United States." This power may include the condition that suitable locks to conserve the navigability of the stream shall be constructed and maintained by the licensee. But "conditions and stipulations" need not and should not stop here. Not only should a definite term for the enjoyment of the privilege be fixed, but an annual charge should be exacted, apportioned, as in Australia, to the horse-power production or, better yet, on the basis of the converted power reckoned in kilowatt hours. Why not? A special privilege in what all the public possess rights is enjoyed by the beneficiary. The public indirectly contribute of their money to maintain the permanence and relative regularity of the stream-flow, on which power in part depends, through its maintenance and care of those great natural conservators of moisture, the forests. The effect may be great or slight, proximate or remote. But it is there —a tangible asset of measurable value to the producer of power. In proportion to its value, the charge is capable of adjustment.

Aside from this, another reason for an annual charge is suggested by the existence of the lock; and in a navigable stream blocked by a dam, a lock is a necessary part of the structure. In the discharge of its duty to regulate commerce, the government should not delegate its obligation to operate such a lock to the power producer. Congress representing the public and using its money must provide an operator to tend the lock and to expedite the transportation of commerce. The lock is there because the dam is there; the dam is there that an individual, a person or a corporation, may enjoy certain privileges in what, of right, belongs to the public. Should the public pay the cost of operating an artificial device for the passage of commerce-laden vessels, occasioned by the obstruction of a natural course for the special benefit of one? Should I pay the expense of a gatekeeper required by my gratuitous grant of a right of way to another across my premises? The charge is not only legitimate and within the power of Congress to impose, but it is right and proper that he who enjoys the public's property should render recompense exactly as he would to the private owner.

Where the Federal Government creates the power in whole or in part, there is little opposition to the imposition of charges. Despite the attitude of a recent Congress in passing an act conferring special privileges upon an individual in a certain navigable waterway in the West, without any provision as to the payment of an annual charge, after the President, in vetoing a similar measure, had announced that he would sign no bill that did not thus provide; the same Congress later conceded the point in a case where the development of the power itself is the direct result of the government's operation. The recent Act of March 3, 1909 (*Public, No. 317*), provides in part that the right to the flow of water, and riparian water power and other rights now or hereafter owned by the United States in the Saint Mary's river, Michigan, "shall be forever conserved for the benefit of the Government of the United States, primarily for the purposes of navigation and *incidentally for the purpose of having the water power developed,* either for the direct use of the United States, or by lease or other agreement, through the Secretary of War . . . *Provided,* That a just and reasonable compensation shall be paid for the use of all waters or water power now or hereafter owned," etc. The act limits the term of the lease to thirty years and provides for the readjustment of compensation at periods of ten years, and again, doubly to assure, states that no such rights shall be granted "without just and adequate compensation."

The act expresses what I urge is well within the constitutional field of federal legislation: the right to dispose by lease of a water power created by the United States in the course of operations having the primary purpose of improving or conserving navigation. The language is a little startling in its ingenuous avowal that a part of the purpose, although incidental, is "having the water power developed." The Congress has no authority deliberately to create a water power for the purpose of disposing of it by lease; but if in the discharge of its duty to aid navigation, it unavoidably brings into existence such a power, it has the right of any private owner in disposing of its property, subject always to the superior right of the public in the free navigation of the stream. The Congress may not *purposely* develop a water power save for national needs; but it may purposely do things in aid of navigation which it well knows will incidentally result in the creation of such a power.

It may not build a storage reservoir for the purpose of maintaining the stability of water power; but it may do so under the guise of regulating commerce. It may not acquire from private owners a great forest about the headwaters of a stream for the purpose of conserving stream flow in aid of power development; but it has plenary authority so to act if the avowed purpose and certain effect are to assist navigation. Many peculiar things are done in the name of liberty; a few have been done in the name of the Constitution.

But there is another and a larger class of improvements; a class including water power developed in a navigable stream, under a federal or local franchise, with the consent of the Federal Government. Under the law already noticed, the owner of the franchise may not build his dam until the Secretary of War and the Chief of Engineers have approved the location as well as the plans; and in the act of approval they may impose conditions and stipulations "necessary to protect the present and future interests of the United States," where the authority to build the dam proceeds from Congress. In these instances, the Government does not build the dam or create the power. Perhaps it has done naught in aid of navigation on that stream. The water, in theory, is the property of the state and not of the nation. The fall is provided by nature and by the work of man—the individual rather than the public. The two elements which make the power are there without the aid of the Federal Government; the latter owns nothing—merely owes a duty. How, then, can it impose a charge? Yet President Roosevelt, in two sturdily patriotic messages vetoing bills granting such franchises, declared that he would sign no bill unless the same provided, among other things, that "There should be a license fee or charge which, though small or nominal at the outset, can in the future be adjusted so as to secure a control in the interest of the public."

In certain quarters, it is denied that the United States has power to impose a charge in such a case. It is argued that the charge would be either a direct tax or in the nature of an impost or excise tax. If the former, it must be apportioned among the states rather than levied directly by the Federal Government itself; if the latter, it must be uniformly levied on every dam and water power in the entire country.

The latter objection, however, is not altogether sound. Uni-

formity, in the sense of the constitutional provision respecting taxation, means a geographical uniformity, the tax operating on all similar properties. That is, in every instance where the Federal Government approves the location and plans of a dam, thereby authorizing its construction, whether in a navigable waterway east, west, north or south, the tax must be uniformly laid. But a water power developed on a non-navigable stream, without let or license from the National Government, would stand in another category. Any rule of conformity would not necessarily involve the inclusion of such dams or water power privileges; it would merely require the levy of such a tax upon every power privilege similarly authorized or confirmed by the Federal Government.

Recurring to the act of Congress establishing the California Debris Commission, already noticed in part, we find provisions for a "tax" which applies with no "geographical uniformity" throughout the country, but is restricted in operation to only a part of the State of California.

Briefly: The hydraulic process in mining may not be employed about the tributaries of certain navigable streams in that state without permit from the commission, the permit to be granted upon petition and hearing. The license, if granted by a majority of the board, embodies directions and specifications in detail as to the manner in which operations may proceed; what restraining or impounding works shall be built and maintained, and where they shall be located; "and in general set forth such further requirements and safeguards as will protect the public interests and prevent injury to the said navigable rivers, and the lands adjacent thereto, with such further conditions and limitations as will observe all the provisions of this act in relation to the working thereof *and the payment of taxes on the gross proceeds of the same. Provided,* That all expense incurred in complying with said order shall be borne by the owner or owners of such mine or mines." (*Act of March 1, 1893, Sec. 13.*) The "taxes on the gross proceeds" are imposed by the twenty-third section of the act, which provides that the operators of the mines affected by the act "shall pay a tax of three per centum on the gross proceeds" of the mine so worked, said "tax" to be ascertained and paid in accordance with regulations to be adopted by the Secretary of the Treasury and to be paid into the Federal treasury to the credit of the "Debris Fund," which shall

be expended by said commission under the supervision of the Chief of Engineers and direction of the Secretary of War in the construction and maintenance of restraining works and settling reservoirs in aid of the purpose Congress had in mind in passing the act.

This act had been held to be constitutional, as already noted. Yet in terms it provides for the collection of a "tax" which is neither "apportioned" among the states nor is levied by any rule of uniformity. Rather than a general excise law, it is one of special and circumscribed application. Still, the charge imposed is christened a "tax." If it were a tax, there can be little doubt of the unconstitutionality of the act. Wherein does such a "tax" differ from that to be charged upon the grant of special privileges for power purposes in a navigable stream? Both find their reason for existence in the conservation of navigation, although the miners may be required to pay for privileges connected directly with non-navigable intra-state tributaries, while the power producers operate directly in the navigable stream itself.

But the charge is not a "tax" in the constitutional sense; it is of the nature of a license—the according of a special right or privilege to do a thing, which, without permission, would be unlawful. It is leave and liberty enjoyed as a matter of indulgence at the will of the Federal Government. For, if the latter were to withhold permission, the dam might not be erected. And, in this connection, it may now be noted that there is no power to compel the Secretary of War and the Chief of Engineers to approve any location or plan. The writ of mandamus would not lie to compel approval, for the function of these officers is not ministerial, but entirely discretionary. Congress placed no limitation upon their power to impose conditions and stipulations as to dams it authorizes, except that the aim must be to protect the present and future interests of the United States; the officers to be judges of the necessity and wisdom of the terms.

The power to charge for a special privilege is not necessarily an exercise of the power to tax. It is rather the right to exact a *quid pro quo*. Public interests are bound to be jeopardized, even though certain advantages to a locality accrue from the establishment of the power plant. One has already been suggested—the operation of a lock; for the very fact that gives the Federal Government

any measure of control—viz., the navigability of the stream—involves the conservation of navigation through artificial means. The charge imposed liquidates this that otherwise would be a burden in the nature of a tax upon the public. Aside from this, another potential element of cost to the public is involved—the possibility that the Government may be obliged to remove the obstruction caused by the building of the dam at its own cost. Ordinarily this has been guarded against by the exaction of a bond in a large penal sum, the burden of carrying which is an annual charge upon the owners of the franchise. What vital objection can there be to the adoption of a plan whereby the licensee, in lieu of annual tribute to a bonding company, pays such premiums into the federal treasury—a measure of insurance against the loss that might be occasioned were the franchise holder bankrupt and the needs of navigation were to require the removal of the dam? The fund created by the payment of these charges may be either devoted directly to the betterment of navigation, particularly in the removal of obstructions, or turned into the Treasury as a part of the general fund, indirectly serving the same purpose by relieving the taxpayer. If the Federal Government has the power to withhold approval, it has power to bestow approval upon such terms as it may deem necessary to impose in order to protect the present or future interests of the United States. If it has the power to exact a bond to protect the public against loss when, in the interest of navigation, it becomes necessary to remove the obstruction, it has the power to create a fund for the same purpose. If the public in general contribute to that fund, their contributions are in the nature of a tax. If, however, the special beneficiaries of the granted permission contribute to establish such a fund, it is not a tax, but a license charge, the sole similarity being that both are a rendering to Cæsar of the things that are Cæsar's.

Moreover, it is entirely competent for Congress to insist that no privileges affecting navigable streams shall be granted to any corporation unless said corporation operates under a federal charter. The United States has authority to create a corporation as a means of carrying into effect any of its sovereign powers. (*McCulloch* v. *Maryland*, 4 Wheat. 316, 411.) Such a corporation may be authorized to construct a dam and lock in aid of navigation, and the incidentally developed power may be disposed of by the creature as well as by the sovereign itself—under such terms and conditions as

Congress sees fit to impose. This would bring every power company using the navigable waters of the nation directly under the visitorial control of a federal commission, the Interstate Commerce Commission, for instance, with power to regulate charges and to prevent the formation of unlawful or monopolistic combinations. It is only natural that such companies should receive their corporate animation from the power which controls and regulates interstate commerce, because the ulterior purpose of their being, thus created, would be the production and transmission of power, in itself a feature of commerce which, in its development and utilization, will acknowledge no state bounds. In the incorporation of such companies, coupled with the grant of these privileges in the waterways of the nation, the imposition of charges, the tribute that the creature pays to its creator, will follow easily, logically, and lawfully.

In conclusion: With non-navigable streams, three parties are concerned, (1) the riparian, or appropriator, who has a peculiar property interest therein, and (2) the state, which may have certain police duties to perform in the conservation of public welfare, and (3) the Federal Government, whose interest is strictly confined to such streams as are tributaries of a navigable watercourse and then only when the navigability of the latter is threatened. With the single exception just noted, the state has exclusive jurisdiction in the realm of legislative activities affecting such streams.

With navigable streams, the same parties are concerned, but in reverse order: (1) the United States, with the paramount duty of improving and maintaining navigation, preserving a superior use in the water, but without ownership thereof or of the subjacent or adjacent soil except in the occasional instance of riparian proprietorship; (2), the state, whose interest is a derivative of its sovereignty, holding its property therein as trustee for all public uses save navigation, subrogated to the superior rights of the Federal Government and of such rights as the riparian owner or appropriator may possess; and (3) the riparian owner or appropriator himself. The National Government has legislative control of all matters affecting navigation primarily and, to the extent already discussed, of the power development incidentally, when the latter affects the former; and in theory it is not easy to divorce the twain. All else is within the scope of state legislation.

The federal power proceeds from its obligation to regulate com-

merce, of which navigation is but a part. The prospective power development through hydro-electric agencies will be the solution of many existing problems involving the transportation of interstate commerce. The fundamental physical power, to be changed into an easily transmissible form of energy, will, in the future, be found in the greater waterways of the country—the navigable streams. The requirements of navigation and power development must be nicely adjusted; the latter not to interfere with the former; the former not to prevent the latter. The state may not oust the jurisdiction of the Federal Government in the regulation of the former. If the latter is exclusively a matter of state regulation, there will be conflict in adjustment. The public welfare of the whole nation is involved; not that of one state. Any uniform rule in the grant of power franchises which will abort monopoly by restricting the term of the grant to a definite time coupled with the exaction of a charge adjustable occasionally as the country's welfare may demand, and with a provision for revocation in the event of any attempted combination of interests which would effect a restraint of trade, must, and I believe constitutionally can, find its origin in an act of Congress.